



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205-AB58

Temporary Non-agricultural Employment of H-2B Aliens in the United States

AGENCY: Employment and Training Administration, Labor.

ACTION: Guidance.

SUMMARY: The Department of Labor (the Department) is providing notice of the judicial order enjoining the Department from implementing and enforcing the Temporary Non-agricultural Employment of H-2B Aliens in the United States, published February 21, 2012 (the 2012 H-2B Final Rule). The 2012 H-2B Final Rule revised the requirements by which employers seeking H-2B workers apply for a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. The effective date of the 2012 H-2B Final Rule was April 23, 2012. The operative date of the 2012 H-2B Final Rule was April 27, 2012. This document provides guidance to the regulated community of the injunction, by judicial order, of the 2012 H-2B Final Rule and the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation.

DATES: This guidance is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For further information, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: On February 21, 2012, the Department published a Final Rule amending the H-2B regulations at 20 CFR part 655, Subpart A. 77 FR 10038, Feb. 21, 2012. On April 23, 2012, the Department published guidance which provided that applications filed under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 78020, Dec. 19, 2008 (the 2008 H-2B Rule), must be sent to the Office of Foreign Labor Certification's (OFLC's) Chicago National Processing Center (CNPC) and postmarked no later than midnight April 26, 2012. The guidance also provided that applications postmarked on or after April 27, 2012 will be adjudicated in accordance with the requirements described in the 2012 H-2B Final Rule.

On April 16, several plaintiffs challenged the 2012 H-2B Final Rule in the U.S. District Court for the Northern District of Florida (Bayou Lawn & Landscape Services, et al. v. Hilda L. Solis, et al., 3:12-cv-00183-MCR-CJK), seeking to preliminarily enjoin the Department from implementing the rule on the basis that the Department lacked authority to issue the 2012 H-2B Final Rule and that the rule violated both the Administrative Procedure Act and the Regulatory Flexibility Act. Bayou Lawn & Landscape Services,

et al. v. Solis, Case 3:12-cv-00183-MCR-CJK, Complaint at 5 (Apr. 16, 2012). On April 26, 2012, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the Department from implementing or enforcing the 2012 H-2B Final Rule pending “the court’s adjudication of the plaintiffs’ claims.” Bayou Lawn & Landscape Services et al. v. Solis, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012).

Therefore, employers must file H-2B labor certification applications under the 2008 H-2B Rule, using those procedures and forms associated with the 2008 H-2B Rule for which the Department has received an emergency extension under the Paperwork Reduction Act. However, please be aware that this preliminary injunction necessarily calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and DHS’s regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers. OFLC will post additional filing guidance on its Web site at <http://www.foreignlaborcert.doleta.gov/>.

Signed in Washington, D.C. this 11th day of May, 2012.

Jane Oates
Assistant Secretary, Employment and Training Administration

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